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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 133

ISAO HITAI, also known as MARIO ISAO HITAI,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Isao Hitai, also known as Mario Isao Hitai, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 29, 1965.

Opinions Below

The opinion of the Court of Appeals, affirming the determination by a special inquiry officer and the Board of Immigration Appeals has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 29, 1965. The jurisdiction of the Court of Appeals was invoked by petitioner under Section 106(a) Immigration and Nationality Act (8 U.S.C. 1105a(a)) and jurisdiction of this Court is invoked under Title 28 Sec. 1254(1) U.S.C.

Questions Presented

(1) Whether the Congress of the United States of America has unlimited right to pass laws pertaining to immigration to the United States, or is it bound by the provisions of the Fifth Amendment of the United States Constitution and those standards of equal protection of laws contained by implication in said Amendment.

(2) Whether immigration laws, which set up a quota system for native born Brazilians, which base their right to enter the United States for permanent residence upon the amount of Asiatic blood in the said person's body are discriminatory and unconstitutional.

(3) Whether Section 202(b)(4) of the Immigration And Nationality Act is arbitrary and discriminatory and violative of the Fifth Amendment of the United States Constitution.

(4) Whether Section 202(b)(4) of the Immigration And Nationality Act violates Chapter IX Article 55 of the United Nations Charter.

The Constitutional and Statutory Provisions Involved

This case, and the petition presented involved the Fifth and Fourteenth Amendments to the Constitution of the United States, Sections 202(b)(4) (8 U.S.C. 1152(b)(4)) 245 (8 U.S.C. 1255) 244(e) (8 U.S.C. 1254) of the Immigration And Nationality Act and Chapter IX Article 55 of the United Nations Charter (59 Stat. 1033). The provisions of each of these are fully set forth as Appendix B.

Statement of the Case

Petitioner, a citizen of Brazil, was born in Brazil. His father, who is now dead, was a Brazilian citizen as is his mother, who is still living. Both parents were natives of Japan, of the Japanese or Asiatic race.

Petitioner entered this Country as a temporary visitor for pleasure on January 25, 1964, with permission to remain in that status until June 30, 1964.

Immigration proceedings were started prior thereto to deport petitioner for having worked while in the United States, which is a violation of the terms of petitioner's entry as a visitor. He admitted working since February 17, 1964. The petitioner was found deportable and applied to adjust his status from that of a bona fide nonimmigrant to that of an alien lawfully admitted for permanent residence, under Section 245(a) of the Immigration And Nationality Act (8 U.S.C. 1255). Petitioner being physically present in the United States.

The special inquiry officer of the Immigration And Naturalization Service denied petitioner's application on the ground that petitioner did not meet the requirement of

Section 245(a) of the Immigration and Nationality Act (8 U.S.C. 1255).

It was found that the petitioner, although born in an independent country of Central or South America, and would ordinarily be classified as a nonquota immigrant, pursuant to Section 245(a) of the Immigration and Nationality Act, was an exception to the rule and within the terms of Section 202(b)(4) of the Immigration and Nationality Act (8 U.S.C. 1152). Pursuant to the terms of said Section an "immigrant born outside of the Asia-Pacific triangle (which is defined by geographic boundaries including Japan) who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to not more than one separate quota area, situate wholly within the Asia-Pacific triangle, shall be chargeable to the quota of that area" and it was therefore held that a visa was not available to petitioner under the Japanese quota.

The petitioner instituted a petition for review in the United States Court of Appeals, Second Circuit, pursuant to Section 106(a) of the Immigration And Nationality Act, 8 U.S.C. 105a(a) after exhausting all administrative remedies. The petition was filed within six months of the order of the Board of Immigration Appeals and was not barred by the statute of limitations.

The petitioner questioned the power of Congress to pass laws which were violative of the Fifth and Fourteenth Amendments, requested that Section 202(b)(4) of the Immigration And Nationality Act (8 U.S.C. 1152) be declared unconstitutional and also violative of the United Nations Charter.

The petition was denied.

Reasons for Granting the Writ

(1) The power of the Congress of the United States of America to create laws is granted to it by the Constitution of the United States of America.

The Constitution of the United States of America sets forth the boundaries and the limits of the power of Congress to enact laws.

There is no mandate in the United States Constitution pertaining to the power to regulate immigration, however, the power to establish a uniform rule of immigration by the Congress has never been doubted.

The limits of the power of Congress in establishing the uniform rule must be within the confines of the United States Constitution and none of its provisions must be abrogated or exceeded as to permit Congress to go beyond the provisions of the Constitution will be a grant to Congress to re-write it and ultimately destroy it. To amend or change the Constitution is a power reserved to the people of the United States of America.

> "The proposition that the 'plenary' power of Congress over naturalization is uninhibited, even by the constitutional prohibition of racism, is one that is open to grave doubts in my mind." "Racism has no justifiable place whatever in our way of life, even when it appears under the guise of 'plenary' power." *Oyama* v. *State of California,* 332 U.S. 633 at p. 664.

(2) An alien legally in the United States of America is entitled to the benefits of all United States laws. *Ex parte Kurth,* D.C. Cal. 1939, 28 Fed. Supp. 258.

The Fifth Amendment of the United States Constitution guarantees due process of law to all persons in the United States of America and those standards of equal protection of the laws contained by implication in that Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

A law that sets up requirements for admission of Brazilians to the United States of America according to the amount of Asiatic blood in the veins of the Brazilians violates all concepts of due process of law guaranteed by the Fifth Amendment to the United States Constitution.

> "Equal protection of laws is not achieved through indiscriminate imposition of inequities." *Shelley* v. *Kramer*, 334 U.S. 1.
>
> "All persons subject to legislation shall be treated alike under like circumstances and conditions both in privileges conferred and in the liabilities imposed." *State* v. *Reynolds*, 1 A. 2d 730.

(3) Section 202(b)(4) of the Immigration And Nationality Act (8 U.S.C. 1152) in effect arbitrarily sets up a division between native born Brazilians according to the amount of Asiatic blood they have in their veins.

Generation after generation of native born Brazilians of Asiatic ancestry who continue to intermarry with people of Asiatic ancestry will never be on an equal status with other Brazilians due to Section 202 (b) (4) of the Immigration And Nationality Act, and are therefore denied due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

Section 202(b)(4) of the Immigration And Nationality Act sets up an unreasonable discrimination because of the

origin of a person's ancestors, his race, color and the type and character of blood that flows through his veins.

Section 202(b)(4) of the Immigration And Nationality Act is therefore unconstitutional.

See *Tujii* v. *State,* 242 P. 2d 617, held at p. 625:

> "Where, however, as here, the classification is on the basis of race, it is 'immediately suspect' and will be subjected 'to the most rigid scrutiny'." *Korematsu* v. *United States,* 323 U.S. 214.

At p. 631, quoting *Oyama* v. *State of California,* 332 U.S. 633:

> "Distinction between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

At p. 632:

> "The fundamental principle enunciated by the equal protection clause of our Constitutions, both state and federal, means equality for aliens within our country as well as citizens."

(4) The United States of America has been the prime mover in the creation of the United Nations and in writing the Charter under which it exists.

The Charter of the United Nations provides for the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

These principles are guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

These principles are the very foundation of our way of life and our basic form of government.

The people of the United States of America in helping to create the United Nations envisioned that these basic human rights of equality, without discrimination, would be accepted throughout the world and any law of the United States of America which violates those concepts, violates the reason for the birth of the United States of America and its participation in the creation of the United Nations.

> "In Asia we face a well organized minority group attempting to unite the East against us. We can show the people of the Orient we stand back of our national pledge of 'liberty and justice for all' by welcoming worthy persons and providing them equality under our naturalization and immigration laws. From a purely selfish standpoint, wiping discrimination off the books as well as out of our hearts would be worth more to us in the Orient than a dozen army divisions." *Oyama* v. *State of California,* 332 U.S. 633.

CONCLUSION

The petition for certiorari should be granted and this Court exercise its power to declare Section 202 (b)(4) of the Immigration and Nationality Act (8 U.S.C. 1152(b)(4)) unconstitutional.

Respectfully submitted,

FRANCIS L. GIORDANO
Member of the bar of the
Supreme Court of the United States
Attorney for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 358—September Term, 1964.

(Argued March 5, 1965 Decided March 29, 1965.)

Docket No. 29176

ISAO HITAI, also known as MARIO ISAO HITAI,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Petition for review of a determination by a special inquiry officer and the Board of Immigration Appeals that petitioner is not eligible under Section 245(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1255(a) (Supp. V, 1964), for adjustment of status from that of a nonimmigrant temporary visitor to that of a permanant resident. Immigration and Nationality Act §202(b)(4), 8 U. S. C. §1152(b)(4) (1958).

Petition denied.

FRANCIS L. GIORDANO, Brooklyn, N. Y., *for Petitioner.*

JAMES G. GREILSHEIMER, Special Assistant United States Attorney, New York, N.Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Francis J. Lyons, Special Assistant United States Attorney, New York, N. Y., of counsel), *for Respondent.*

HAYS, *Circuit Judge*:

Petitioner, a citizen of Brazil, was born in Brazil. His father, who is now dead, was a Brazilian citizen as is his mother who is still living. Both parents were, as the special inquiry officer found, "natives of Japan of the Japanese or Asiatic race."

Petitioner entered this country as a temporary visitor for pleasure on January 25, 1964, with permission to remain in that status until June 30, 1964.

In May 1964 the Immigration and Naturalization Service commenced deportation proceedings charging petitioner with having violated the terms of his permission to enter as a visitor by working as a hospital porter. At the hearing held pursuant to Section 242(b) of the Immigration and Nationality Act[1] petitioner admitted that he had worked full time since February 17. The special inquiry officer found him deportable. Petitioner then applied for adjustment from the status of a "bona fide nonimmigrant" to that of "an alien lawfully admitted for permanent residence" under Section 245(a) of the Act.[2] The special inquiry officer denied the application on the ground that peti-

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[1] 66 Stat. 209 (1952), 8 U. S. C. §1252(b) (1958).

[2] 74 Stat. 505 (1960), 8 U. S. C. §1255(a) (Supp. V, 1964).

tioner did not meet the requirement of Section 245(a) that "the alien [be] . . . eligible to receive an immigrant visa." Although as an "immigrant who was born in . . . an independent country of Central or South America," petitioner would otherwise be classified as a "nonquota immigrant,"[3] the special inquiry officer assigned petitioner to the quota area for Japan because of Section 202(b)(4) of the Act. Under the terms of that section an

> "immigrant born outside the Asia-Pacific triangle [defined by geographic boundaries including Japan] who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to not more than one separate quota area, situate wholly within the Asia-Pacific triangle, shall be chargeable to the quota of that quota area . . ."[4]

A visa is not available under the Japanese quota.

The Board of Immigration Appeals approved the special inquiry officer's decision, but, rather than ordering deportation, granted petitioner permission to depart voluntarily.

The Immigration and Naturalization Service concedes that this order is reviewable by this Court under Section 106(a) of the Act[5] as interpreted in *Foti* v. *Immigration and Naturalization Serv.*, 375 U. S. 217 (1963),[6] and we concur.

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[3] §101(a)(27)(C), 66 Stat. 169 (1952), 8 U. S. C. §1101(a)(27)(C) (1958).

[4] 66 Stat. 177 (1952), 8 U. S. C. §1152(b)(4) (1958).

[5] 75 Stat. 651 (1961), 8 U. S. C. §1105a(a) (Supp. V, 1964).

[6] See *Talavera* v. *Pedersen*, 334 F. 2d 52 (6th Cir. 1964); *Skiftos* v. *Immigration and Naturalization Serv.*, 332 F. 2d 203 (7th Cir. 1964).

Petitioner challenges the constitutionality of Section 202 (b)(4) on the ground that it prescribes a standard which is arbitrary and unreasonably discriminatory. He argues that a law that discriminates between native-born Brazilians for the purpose of granting permanent residence in the United States, by assigning those Brazilians whose ancestry is attributable to certain "Asiatic races" to a quota area, which has a definite limit, and permitting other Brazilians whose ancestry is not so attributable to enter the United States as permanent residents without any quota area limit, violates the requirements of due process of law guaranteed by the Fifth Amendment and those standards of equal protection of the laws contained by implication in that amendment.

We are constrained to reject petitioner's claim that Section 202(b)(4) as here applied is unconstitutional. The exclusion and deportation of aliens pursuant to statute falls within that category of policy decisions, which, "so far as the subjects affected are concerned, are necessarily conclusive upon all . . . . [the government's] departments and officers," including "the judiciary." *The Chinese Exclusion Case,* 130 U. S. 581, 606 (1889). In *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 588-89 (1952), Mr. Justice Jackson said:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." (Footnote omitted.)

See also *Galvan* v. *Press*, 347 U. S. 522, 531 (1954); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893).

Petitioner also bases his argument on Article 55 of the United Nations Charter which provides for the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This provision of the Charter is not self-executing and therefore did not *ex proprio vigore* repeal or invalidate any of the laws, including the immigration laws, of the member states. *Vlissidis* v. *Anadell*, 262 F. 2d 398 (7th Cir. 1959). Compare *Sei Fujii* v. *State*, 38 Cal. 2d 718, 242 P. 2d 617 (1952).

The petitioner makes no claim that he was not accorded a full hearing with adequate notice pursuant to Section 242(b) nor that the statutes were misapplied or that the facts were incorrectly found in his case. Therefore the petition must be denied.

Denied.

APPENDIX B

Relevant Statutes

Immigration and Nationality Act:

Section 101(a)(27), 8 U.S.C. (1958 ed.) §1101(a)(27):

"The term "nonquota immigrant" means—

(A) an immigrant who is the child or the spouse of a citizen of the United States;

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(C) an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and the spouse or the child of any such immigrant, if accompanying or following to join him; . . ."

Section 202, 8 U.S.C. (1958 ed.) §1152:

"(a) Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship system of the United Nations, other than the United States and its outlying possession and the countries specified in section 1101(a)(27)(C) of this title, shall be treated as a separate quota area when approved by the Secretary of State. All other inhabited lands shall be attributed to a quota area specified by the Secretary of State. For the purposes of this chapter, the annual quota to which an immigrant is chargeable shall be determined by birth within a quota area, except that . . ."

"(5) . . . any alien who it attributable by as much as one-half of his ancestry to a people or peoples indigenous to the Asia-Pacific triangle defined in subsection (b) of this section, unless such alien is entitled to a non-quota immigrant status under paragraph (27) (A), (27) (B), (27) (D), (27) (E), (27) (F), or (27) (G) of Section 1101 (a) of this title, shall be chargeable to a quota as specified in subsection (b) of this section: *Provided*, That the child of an alien defined in section 1101 (a) (27) (C) of this title, if accompanying or following to join him, shall be classified under section 1101 (a) (27) (C) of this title, nothwithstanding the provisions of subsection (b) of this section."

"(b) With reference to determination of the quota to which shall be chargeable an immigrant who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to the Asia-Pacific triangle comprising all quota areas and all colonies and other dependent areas situate wholly east of the meridian sixty degrees east of Greenwich, wholly west of the meridian one hundred and sixty-five degrees west, and wholly north of the parallel twenty-five degrees south latitude— . . ."

"(4) such immigrant born outside of the Asia-Pacific triangle who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to not more than one separate quota area situate wholly within the Asia-Pacific triangle, shall be chargeable to the quota or that quota area;"

Section 245(a), 8 U.S.C. (Supp. V, 1959-1963) §1255(a):

"The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into

the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

United States Constitution:

Amendment V—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

* * *

Amendment XIV—

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * *

United Nations Charter:

Chapter I—Purposes and Principles—Article 1—

* * *

"3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion; and"

* * *

Chapter IX—International Economic and Social Cooperation—Article 55—

"With a view to the creation of conditions of stability and well-being which are necessary for the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems, and international cultural and educational cooperation; and

c. universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."